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0474

September 9, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

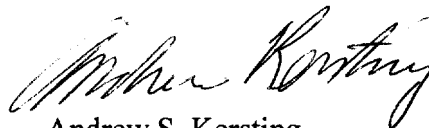
Re: Amendment of Section 73.202(b), Table
of Allotments, FM Broadcast Stations
(Tishomingo, Tuttle, Woodward,
Mooreland, and Alva, Oklahoma)

Dear Mr. Caton:

Enclosed herewith on behalf of Chisholm Trail Broadcasting Co., Inc., licensee of Station KXLS(FM), Alva, Oklahoma, are an original and four copies of its "Reply to Supplement to Petition for Rule Making," filed in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,



Andrew S. Kersting
Counsel for
Chisholm Trail Broadcasting Co., Inc.

Enclosures

cc (w/ encl.): Certificate of Service

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Federal Communications Commission

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WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. _____
Table of Allotments,) RM- _____
FM Broadcast Stations)
(Tishomingo, Tuttle, Woodward,)
and Alva, Oklahoma))

To: Chief, Allocations Branch

REPLY TO
SUPPLEMENT TO PETITION FOR RULEMAKING

Chisholm Trail Broadcasting Co., Inc. ("Chisholm"), licensee of Station KXLS(FM), Alva, Oklahoma, hereby replies to the "Supplement to Petition for Rule Making," filed August 27, 1997 ("Supplement"), by Ralph Tyler ("Tyler"). In reply, the following is stated:

I.
Background

Tyler is the licensee of Station KTSH(FM), Tishomingo, Oklahoma. On March 21, 1997, Tyler filed a Petition for Rule Making ("Petition") proposing the reallocation of Channel 259C3 from Tishomingo to Tuttle, Oklahoma, and the modification of the license for KTSH to operate on Channel 259C3 at Tuttle. In order to effectuate his proposal, Tyler proposed to substitute Channel 260C1 for Channel 259C1 at Alva, Oklahoma, and modify the license of Station KXLS to operate on Channel 260C1. Tyler also proposed to substitute Channel 292C1 for Channel 261C1 at

Woodward, Oklahoma, and modify the license of Station KWFY-FM, Woodward, to operate on the new channel.¹

Chisholm filed a Motion to Dismiss Tyler's proposal on June 25, 1997 ("Motion"). In its Motion, Chisholm demonstrated that Tyler's proposal does not comport with the Commission's *Report and Order in Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990), because the proposed change in community of license of Station KTSH from Tishomingo to Tuttle would deprive Tishomingo of its only local transmission service. *See* Motion, p. 2 *et seq.* Indeed, in *Change of Community R&O*, the Commission stated that it would "not allow any broadcaster to take advantage of this new procedure if the effect would be to deprive a community of an existing service representing its only local transmission service." 4 FCC Rcd at 4874. Moreover, in its reconsideration order, the Commission stated:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. . . . *We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to "existing service" occasioned by removal of an operating station.* From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply turning on a . . . radio set.

¹ Station KWFY-FM, Woodward, Oklahoma, is licensed to Classic Communications, Inc.

Change of Community MO&O, 5 FCC Rcd 7097 (1990) (emphasis added). See also *Kaukana and Cleveland, Wisconsin*, 6 FCC Rcd 7142, 7143, n.3 (Allocations Branch 1991) (replacing an operating station with a vacant allotment does not adequately cure the disruption to existing service).

Tyler filed an opposition to Chisholm's Motion on July 9, 1997, claiming that his Petition should be accepted even though it is contingent upon the activation of a new broadcast service at Tishomingo. Opposition, p. 4. However, Tyler failed to acknowledge the Commission's decision in *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Policy and Rules Division 1996), in which the Policy and Rules Division announced that the Commission no longer will accept petitions for rulemaking which are contingent upon the actions of third parties in order to effect compliance with the FCC's rules.

II. Tyler's Supplemental Pleading

In a further effort to support his proposal, Tyler now proposes what he describes as a "solution" to the mutual exclusivity between his proposal and that of FM 92 Broadcasters, Inc. ("FM 92"), which has a rulemaking petition pending proposing the allotment of Channel 261C1 to Mooreland, Oklahoma.² Specifically, Tyler proposes the following:

- (1) Substitute Channel 292 for Channel 261 at Woodward, and modify Station KWFX-FM's license to specify operation on Channel 292. Tyler claims that Channel 292 can operate as a Class C1 facility from KWFX-FM's present transmitter site;
- (2) Allot Channel 283C1 to Mooreland, Oklahoma, which can be used at the allocation site proposed by FM 92;

² FM 92 filed a petition for rulemaking on March 21, 1996, proposing, *inter alia*, the allotment of Channel 261C1 to Mooreland, Oklahoma. This proposal is mutually exclusive with Tyler's because, if adopted, FM 92's proposal would preclude the substitution of Channel 260C1 for Channel 259C1 at Alva, which is necessary to implement Tyler's proposal.

- (3) Substitute Channel 260C1 for Channel 259C1 at Alva, Oklahoma, and modify Station KXLS' license to specify operation on the new channel;
- (4) Allot Channel 259C3 to Tuttle, Oklahoma, and modify Station KTSH's license to operate at Tuttle; and
- (5) Delete Channel 259C3 at Tishomingo.

Tyler claims that his proposal will satisfy all parties to this proceeding and permit the Commission to avoid resolving the mutual exclusivity in a rulemaking proceeding. Supplement, pp. 3-4.

Despite Tyler's latest proposal, he failed to address the fact that his pending rulemaking petition violates the procedural policy adopted in *Cut and Shoot*. *Cut and Shoot* makes clear that processing rulemaking petitions (such as Tyler's) which are dependent upon the actions of third parties to effect compliance with the FCC's rules is not "conducive to the efficient transaction of Commission business[,] and imposes unnecessary burdens on the administrative resources of both the Allocations Branch and the Audio Services Division." *Cut and Shoot*, 11 FCC Rcd at 16384, ¶4. Therefore, as demonstrated in Chisholm's reply to Tyler's Opposition to Motion to Dismiss (filed July 21, 1997), it was incumbent upon Tyler to demonstrate in his Petition that his proposal satisfies the "rare circumstances" threshold³ before asking the Allocations Branch to require the Commission and any eventual parties to the rulemaking proceeding to engage in an "avoidable and unnecessary expenditure" of resources which the Policy and Rules Division sought to avoid by adopting the *Cut and Shoot* policy.

³ In its reconsideration order in *Change of Community MO&O*, 5 FCC Rcd 7094 (1990), the Commission clarified that it would entertain requests to waive the prohibition against the removal of an existing station representing a community's sole local broadcast service in "rare circumstances" where, for example, the proposal would provide "a first reception service to a significantly-sized population." *Id.* at 7096.

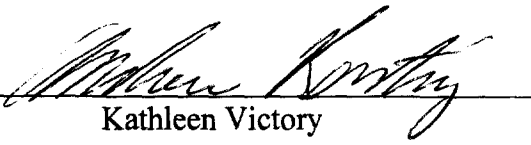
III.
Conclusion

For the reasons stated in Chisholm's Motion and Reply to Tyler's Opposition to Motion to Dismiss, consideration of Tyler's rulemaking proposal at this time would result in (i) an unnecessary expenditure of substantial resources on the part of the Commission and the parties to the rulemaking proceeding, and (ii) considerable delay because the proceeding could not be resolved unless and until a new local service is activated at Tishomingo. Consideration of Tyler's proposal would be particularly prejudicial to FM 92, whose mutually exclusive proposal is not contingent upon the actions of third parties. Therefore, for the reasons articulated in *Cut and Shoot*, Chisholm respectfully requests that the Commission return Tyler's rulemaking petition forthwith, and not permit him to warehouse scarce spectrum indefinitely by filing a rulemaking proposal contingent upon the grant of an application and construction of a proposed new station by a third party, neither of which may ever occur. *See Cut and Shoot*, 11 FCC Rcd 16384, ¶4.

WHEREFORE, in light of the foregoing, Chisholm Trail Broadcasting Co., Inc. respectfully requests that the "Petition for Rulemaking and Request for Issuance of Order to Show Cause," filed March 21, 1997, by Ralph Tyler be DISMISSED or RETURNED as unacceptable.

Respectfully submitted,

CHISHOLM TRAIL BROADCASTING CO., INC.

By: 
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Its Counsel

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September 9, 1997

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 9th day of September, 1997, copies of the foregoing "Reply to Supplement to Petition for Rulemaking" were hand delivered or mailed first-class, postage pre-paid, to the following:

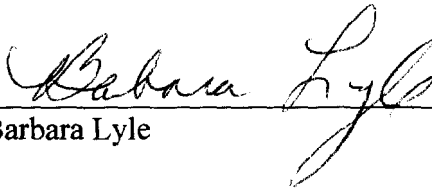
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